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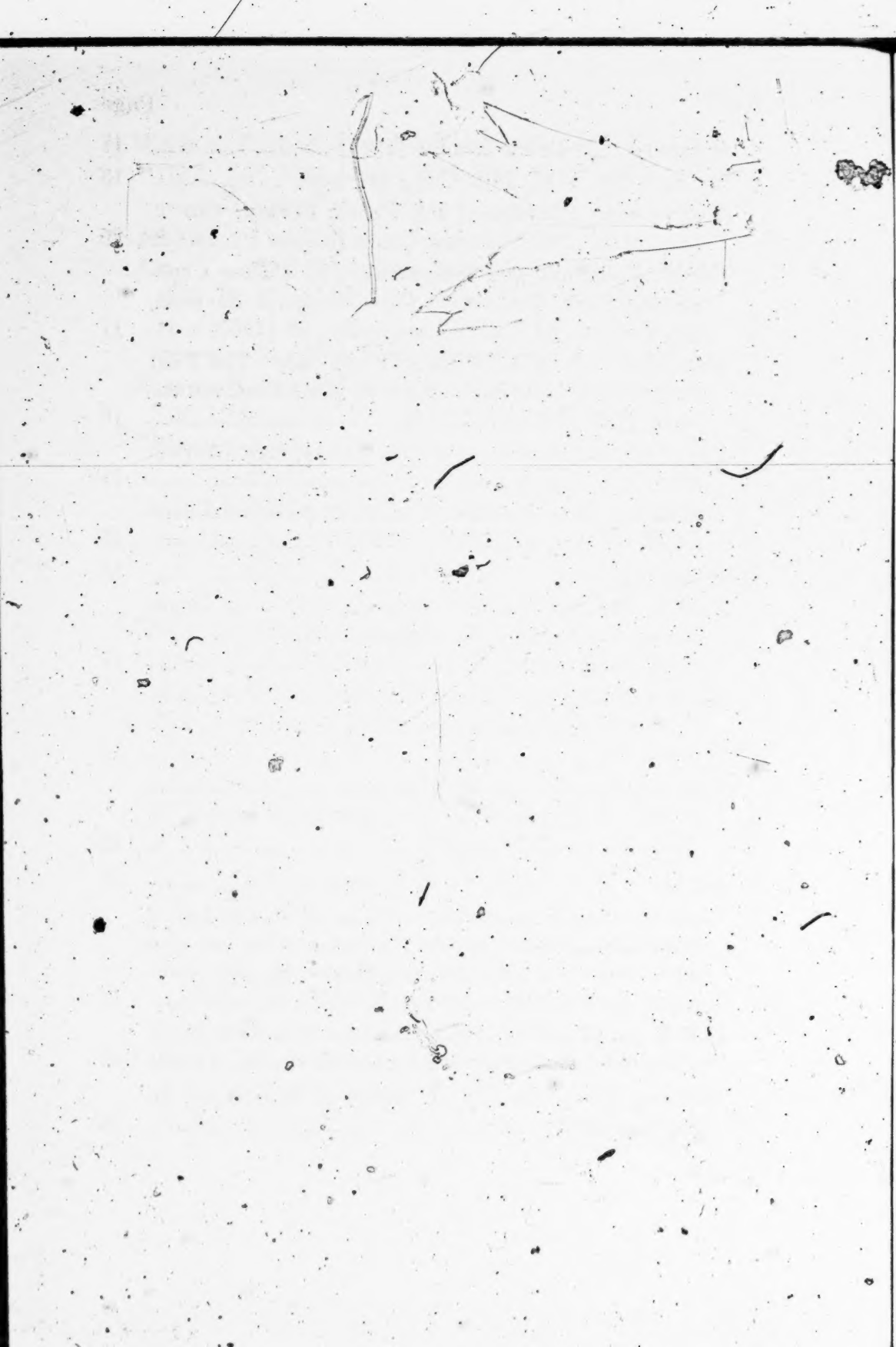

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 463

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the Petitioner's position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 122 national and international labor unions having a total membership of approximately 12,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinion below, jurisdictional statement, questions presented, and the statutory provision involved are set out at pp. 1-2 of Petitioner's brief.

INTEREST OF THE AFL-CIO

The court below, while stating (A. 110-111) that it was not "greatly impressed by the arguments challenging" the validity of the rule announced by the National Labor Relations Board in *Excelsior Underwear Inc.*, 156 NLRB 1235

(1966) which requires employers to furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election, held (A. 111-114) that the rule was invalid because it was enunciated in an adjudicatory rather than in a formal rule-making proceeding. The Board filed a petition for certiorari challenging this holding, No. 463 this term, and the Wyman-Gordon Co. filed a cross petition challenging the rule itself, No. 578 this term. The Board then filed a Memorandum stating (p. 2) that "there is no need to grant the cross petition . . . which is untimely . . . [to] review the substantive validity of the *Excelsior* requirement . . . [for] the Company may argue in No. 463, as an alternative ground for upholding the judgment of the court of appeals, that the *Excelsior* requirement is invalid." On November 12, 1968 the Board's petition was granted and Wyman-Gordon's was denied, 393 U.S. ....., 37 Law Week 3177.

Because it promises more effective union access to employees, employers have attacked the *Excelsior* rule on a wide front. As a result four courts of appeals, other than the court below, have passed on its substantive validity, *National Labor Relations Board* v. *Haynes Hosiery*, 384 F.2d 188 (C.A. 4th Cir., 1967), *certiorari denied* 390 U.S. 950; *National Labor Relations Board* v. *Rohlen*, 385 F.2d 52 (C.A. 7th Cir., 1967), *National Labor Relations Board* v. *Beech-Nut Life Savers*, ... F.2d ....., 69 LRRM 2846 (C.A. 2nd Cir., 1968); *British Auto Parts* v. *National Labor Relations Board*, ... F.2d ....., (C.A. 9th Cir., No. 21883, Dec. 17, 1968). Thus this substantive issue is clearly before the Court and it is ripe for adjudication. Certainly, in view of the amount of litigation which has attended *Excelsior*, every consideration of judicial administration calls for a decision on both the substantive and procedural issues posed even though the court below did not reach the former. Since the Board will cover the procedural issue fully, and because of the importance of the substantive issue to the labor movement, the burden of the Federation's brief will

be directed to demonstrating that the *Excelsior* rule is proper and to suggesting a rationale to support its affirmance.

SUMMARY OF ARGUMENT

In *Excelsior Underwear Inc.* 156 NLRB 1235 (1966) (A. 12-28), the National Labor Relations Board ruled that employers must furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election. The National Labor Relations Act guarantees employees the right "fully and freely to discuss and be informed concerning" the opportunity to organize and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, *Thomas* v. *Collins*, 323 U.S. 516, 533-534 (1945). The *Excelsior* rule is so clearly the minimal necessary step to give substance to these rights that there can be no doubt that this Court should reject Respondent's substantive and procedural challenges to it.

1. A campaign to organize a union is a contest between labor and management over the form of the social system that will govern the industrial society of a plant. Since effective union organization can best be promoted by trained persons who devote their full time and knowledge to this task, the union's most effective voice in these contests is the professional organizer. The organizers' main efforts are normally directed to establishing personal contact with the group he seeks to influence, since both union experience and scholarly studies of all types of election campaigns have demonstrated that the single most important factor in determining the choice of the majority of voters is direct personal contact.

Prior to the passage of the Act, the legal and practical problems posed for organizers in their effort to make contact with employees were of extraordinary dimensions. For employers with an anti-union animus, and state and local officials sympathetic to them, have recognized that the

"necessities of the situation" *National Labor Relations Act* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), fuel organizational drives and that the building of a successful union threatens their power and perquisites. Their reaction has been and continues to be widespread active and stubborn resistance to the right to organize. Aside from the use of threats and coercion, the most prevalent legal device used in these campaigns is to inhibit organized labor's access to employees in order to insulate them from the union movement's message, *see, e.g., Thomas* v. *Collins, supra*, 323 U.S. 516; *Hague* v. *CIO*, 307 U.S. 496 (1939); *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949).

The effects of these legal restrictions were, and continue to be, intensified by the practical problems of establishing personal contact with workers in modern America. Public walkways in front of a plant may not suffice because an ever higher percentage of employees drive to work and park within the plant. And if contact cannot be made at the vicinity of the plant the problems become nearly insurmountable, for the sub-group sought to be reached, the workers of a particular plant, melds into the general population. Prior to *Excelsior*, their "names and addresses [were not] readily available" (A. 19). Without this information house to house solicitation is prohibitively expensive in terms of results per dollar and man hour.

2. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." Section 8(a)(1) implements this guarantee by interdicting interference, restraint or coercion of employees in the exercise of their Section 7 rights.

Given the nature of these "guarantees of national law" *Thomas* v. *Collins, supra*, 323 U.S. at 533-534, this Court has struck down a variety of state and local efforts to impede access by unions to employees on the streets and in the

parks and other similar public places. Surprisingly enough, however, in light of the fact that the main purpose of the Act was to free self-organization from employer restrictions, the law governing employer impediments to free access of organizers to employees developed under the Act has not kept pace with the First Amendment developments. Indeed prior to the *Excelsior* decision, which was rendered thirty years after the passage of the Act, the employer's power to thwart union access to employees during organizing campaigns remained unimpared. For the employer's basic power in this regard rests in his control of the plant property and of the list of his employees' names and addresses. And neither of these citadels had been breached prior to *Excelsior*, despite the fact that "apart from the suppressors of outright dishonesty, no regulatory principle has received wider application in the field of elections than the notion that each side should be given substantial access to the voters," since "the opportunity to reach *all* the [voters] is basic to a fair and informed election," Bok, *The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 92, 99-100 (1964) (emphasis added).

The forum to which unions have traditionally sought access, through the Act, is the plant, the natural and appropriate site at which to make contact with all the employees with a minimum of difficulty and expense, *see, National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2nd Cir., 1963), *certiorari denied* 376 U.S. 851. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945), this Court approved Board rulings that an employer could not, consistent with the Act, prevent employees from soliciting for the union or distributing union handbills during non-working time and in non-working areas of the plant. However, in *Babcock & Wilcox*, 351 U.S. 105 (1956), where the Board had ruled that non-employee organizers, as well as employees, could

distribute union literature during non-working time in non-working areas of the plant, this Court held, *Id.* at 112:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit."

Thus the plant was closed to the "correlative . . . right . . . of union[s] . . . to inform employee[s]" concerning unionization. There are three basic flaws in the *Babcock & Wilcox* rule. First, *Babcock & Wilcox,* acknowledging the value of contacts between employees and professional organizers, promises a measure of flexibility in the regulation of access to the plant. However, the lower courts have concluded on the basis of the facts found in *Babcock & Wilcox* that a showing of greater expense or formidable practical difficulty is insufficient and that only impossibility will suffice. Thus in the normal organizing campaign *Babcock & Wilcox* has resulted in total subordination of the right of employees to be fully and freely informed concerning unionization at the plant, and of the correlative right of unions to inform them, to the employer's interests.

Second, this result was not arrived at through an inquiry into the balance to be struck between the substantial employer and employee interests at stake. Indeed, it could not have been arrived at in this manner without reconsidering the rationale of *Republic Aviation,* a step that *Babcock & Wilcox* did not even purport to take. For *Republic Aviation* recognizes that, absent special circumstances, union activity in non-working areas of the plant is compatible with the employer's interest in efficient production and discipline. Thus the employer interest protected by *Babcock & Wilcox* is his bare claim to an absolute right to dominion

over his property, a right claimed simply to prevent his employees from hearing and heeding a union message and possibly organizing to his detriment, *cf.*, *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 324-325 (1968).

Third, quite apart from its substantive nature and effect, the *Babcock & Wilcox* rule is unsound because it has proved impossible to administer in a rational manner. Assuming that the Board had world enough and time, it is most unlikely that it could apply the *Babcock & Wilcox* rule to particular cases in a satisfactory and predictable manner. For a serious effort to grapple with the task set out in *Babcock & Wilcox* requires the Board to balance a "complex of variables" which include a host of unruly "incommensurable quantities," *Case Note: Excelsior Underwear Inc.*, 80 Harv. L. Rev. 459, 462 (1966). Moreover the Board does not have an infinite amount of time to engage in an abstract logical exercise. Its function is to develop and apply manageable rules to govern the fast moving events of an election campaign. Thus *Babcock & Wilcox* is open to criticism on practical grounds since the regulatory context calls for clear rules rather than imprecise standards which are "an invitation to litigation and casuistry" *United Aircraft, supra*, 324 F.2d at 130.

3. In light of the above it is plain that there is no merit in the proposition, advanced by Respondent, that the scope of the *Babcock & Wilcox* rule should be enlarged and that it should become a rule of general application. Nor, we submit, is it desirable to do no more than limit *Babcock & Wilcox* to property cases involving non-employee organizers. Such a course of action would merely be a stop-gap that would leave the Board without a reasoned standard to guide it. What is necessary instead is a return to the approach foreshadowed by *Thomas* v. *Collins*, an approach which builds upon the recognition that the Act intended to put an end to unjustified impediments, erected by either employers or the states, to free access by organizers to

employees. For only such an approach provides the principled basis for the development of the law in this area required for rational administration of the Act.

In *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1948) this Court stated that the "liberty of circulating is as essential to freedom [of speech] as liberty of publishing, indeed, without the circulation the publishing would be of little value, *Ex Parte Jackson*, 96 U.S. 727, 733." Thus methods of communication as well as the content of the communication are entitled to the protections of the First Amendment. The standard governing the circulation of views is that enunciated in *Schneider* v. *State*, 308 U.S. at 161 (1939):

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Since the freedom to circulate views enjoys the same high place in the gamut of values established by the Act that it does in the Constitutional scheme, *see, Thomas* v. *Collins*, *supra*, 323 U.S. at 533-534, it is natural and appropriate for the Board in assessing employer impediments to the enjoyment of the "full freedom to discuss and be informed concerning" unionization to be guided by the balance struck in *Schneider*. For there is no possible policy consideration which justifies according a higher value to employer interests in conflict with free and untrammeled access to employees than is accorded to the conflicting interests of state and local governments.

Schneider and the cases following it do not simply establish the governing standard; they also set the weight to be given to the competing interests which must be considered

in determining whether unions are to have access to the plant and access to a list of the employees' names and addresses. First, *Schneider* itself demonstrates that the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that other places remain open for their expression. Since the thrust of the First Amendment is to maximize communication, the law simply distinguishes between appropriate and inappropriate locations for public speech; it does not seek to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message. Thus *Schneider* highlights the basic defect in the *Babcock & Wilcox* rule. Where interference with the right to circulate views is shown, it is for the State, or the employer, to justify the abridgment, not for the speaker to justify his right to inform, for the principles underlying the First Amendment, and the Act, are his justification.

Second, as this Court stated in *Martin* v. *Struthers*, 319 U.S. 141 (1943), the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that group, rather than individual, notions of the right to privacy, control, and that it is for the State, rather than the individual, to decide whether he shall be free to hear what he wishes to hear. Thus *Martin* v. *Struthers* demonstrates that free access can not be stifled by group decision, even where the individuals to be approached are voting members of the group. It is a *fortiori*, then, that the employer, who has his own interests to consider, interests which are often separate from and to a marked degree antagonistic to those of his employees, can not speak for them.

In sum, we suggest that in weighing competing interests when dealing with employer impediments to the right of employees "fully and freely to discuss and be informed concerning" unionization, and the "corrective . . . right . . .

of union[s] . . . to inform employee[s]" about this subject, the Board should be guided by the *Schneider* standard and by the concrete applications of that standard in *Schneider* itself and in *Martin* v. *Struthers*.

ARGUMENT

THE EXCELSIOR RULE SHOULD BE AFFIRMED SINCE IT IS THE MINIMAL NECESSARY STEP REQUIRED TO GIVE SUBSTANCE TO THE RIGHT OF EMPLOYEES GUARANTEED BY THE NLRA TO DISCUSS AND BE INFORMED CONCERNING UNIONIZATION AND TO THE CORRELATIVE RIGHT OF UNIONS TO INFORM EMPLOYEES ABOUT THIS SUBJECT

In *Excelsior Underwear Inc.*, 156 NLRB 1235 (1966) (A.12-28) the National Labor Relations Board ruled that employers must furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election. The instant case is here because the Respondent, recognizing that *Excelsior* would allow unions more effective access to employees, has followed the classic pattern of employer resistance to free communication between labor organizations and employees by refusing to comply with the *Excelsior* rule and has sought to overturn it on both substantive and procedural grounds.

In *Excelsior* the Board reasoned (A. 18-19, 20-21):

> "Among the factors that undoubtedly tend to impede a reasoned choice [in a representation election] is a lack of information with respect to one of the choices available . . . [A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed . . .
>
> "[W]ithout a list of employee names and addresses, a labor organization, . . . has no method by which it can

be certain of reaching all the employees with its arguments in favor of representation, and, as a result employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation."

* * *

"A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public. When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign material for them. Any candidate for union office is entitled to have the union distribute his campaign literature to all members."

"We see no reason why similar opportunities should not be available in a representation election. As [Dean Bok of Harvard] has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law." (Emphasis in original, footnotes omitted)

The National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*, guarantees employees the right "fully and freely to discuss and be informed concerning" the opportunity to organize and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject *Thomas* v. *Collins*, 323 U.S. 516, 533, 534 (1945). The *Excelsior* rule is so clearly the

minimal necessary step to give substance to these rights that there can be no doubt that it should be affirmed by this Court. The major arguments against the rule, presented by employers, serve only to emphasize the lack of principled objections to it. Thus the employer, both in the instant case and in *Excelsior*, argued that the Board's rule invaded his privacy rights and those of employees. The Board correctly rejected this argument, stating (A. 22-23):

> "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election."
>
> • • •
>
> "By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation."

In addition, both in the instant case and in *Excelsior*, the employer has argued that in light of this Court's decision in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *National Labor Relations Board* v. *United Steelworkers (Nu-Tone Inc.)* 357 U.S. 357

(1958), the Board should require employers to provide names and addresses only in those situations in which all alternative channels of communication are closed to the union.

The *Babcock & Wilcox* rule on alternative channels of communication cuts against the full enjoyment of the basic right of employees to "fully and freely . . . . discuss and be informed concerning" unionization and of the "correlative right . . . of union[s] . . . to inform employee[s]" about this subject. It is thus our view that it should not be read as applying to the period of time after a representation election has been directed. As the Board noted (A.24-25):

> "We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election. . . . [A]ssuming that there is some legitimate employer interest in non-disclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the pre-condition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact. The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed." (Emphasis in original, footnote omitted)

Since a union is required to show that at least 30% of the employees in the unit in question desire an election, Section 9(c)(1) of the Act, Sec. 101.18 Rules and Regulations and Statments of Procedure of the National Labor Relations Board, 29 C.F.R. 101.18, and since an election

loss forecloses the union for a year, Section 9 (c)(3), it can hardly be argued that such a construction of *Babcock & Wilcox* would open the employer to undue intrusions upon his interests. And it is beyond question that the critical period immediately prior to an election is one during which it is especially appropriate to foster and protect "the opportunity for both sides to reach all the employees" (A.21), *cf., Mills* v. *Alabama,* 384 U.S. 214 (1966). The employer's opportunity to reach all his employees is assured under present Board law since he has the right to assemble his employees on paid time to impart his views to them in a captive audience speech without according the union the right of reply *Livingston Shirt Corp.* 107 NLRB 400 (1953); *cf., National Labor Relations Board* v. *Virginia Electric Power Co.,* 314 U.S. 469 (1941). Employers recognizing the value of this technique take full advantage of their rights. In 1965 the Federation conducted a survey of its regional directors and organizers in order to elicit information concerning the 780 representation elections throughout the country in which they participated during 1964. The results of this survey were presented to the Board for its consideration in the *Excelsior* case, and the summary of the findings prepared for the Board are attached as an Appendix to this brief. This survey showed that in 73% of these elections employers made captive audience speeches. Against this background, the reading of *Babcock & Wilcox* we suggest is most certainly warranted. Indeed, as we shall now show, when the right of employees to have free access to organized labor's message unhindered by their employers or state and local authorities is considered in its entirety, it is fair to say, paraphrasing Mr. Justice Frankfurter, that *Babcock & Wilcox* is "a derelict on the waters of the law" *Lambert* v. *California* 355 U.S. 225, 232 (1957, Frankfurter J. dissenting) which should be removed by the Court at this time.

1. A campaign to organize a union is a contest between labor and management over the form of the social system

that will govern the industrial society of a plant. In 98% of these campaigns, if that contest can not be settled by the immediate parties and has to go to the Board, the agency that Congress has established to determine the outcome, the result will be determined in a representation election.[1] Since effective union organization can best be promoted by trained persons who devote their full time and knowledge to this task, *cf.*, H.Rep. No. 1147, 74th Cong. 1st Sess. p. 10., the union's most effective voice in these contests is the professional organizer. The organizer is essential because he is experienced in organizing techniques, familiar with the complexities of modern labor law and labor relations, and invulnerable to the discriminatory discharge which all too frequently befalls employees active in a campaign,[2] *see,* Miller, Problems of Labor, 88-96, 108, 121 (1951), U.S. Dept. of Labor, B.L.S. Bulletin No. 1000, *Brief History of the American Labor Movement,* 44-47 (1950).

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[1] "In fiscal 1967, the Board conducted 8,116 elections, as opposed to 157 cases in which union majorities were established by cards apart from elections (approximately 1.9 percent of the elections conducted). Of these 157 cases, all but 16 involved situations in which a fair election was made impossible or was invalidated by employer unfair labor practices." Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers, Committee on the Judiciary, United States Senate, 69 LRR 157, 165 (1968).

[2] "Violations of Sections 8(a)(3) and 8(b)(2) are, despite 33 years of industrial experience with the law, still the largest single source of all unfair labor practices, and over the years the percentage of such cases has not changed radically. In Fiscal Year 1967, for example, two out of three charges filed against employers —totaling 7,463 charges—alleged discrimination or discharge in violation of the Act. . . . In the labor relations milieu of the late 1960's, seniority rights, health insurance, pension credits and other job-related protections have become commonplace both in organized and unorganized enterprises. The loss of such protections, as a result of illegal discrimination, might destroy the expectations of a lifetime of employment." McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968).

The organizer's main efforts are normally directed to establishing personal contact with the group he seeks to influence, since both union experience and scholarly studies of all types of election campaigns have demonstrated that the single most important factor in determining the choice of the majority of voters is direct personal contact. As Professors Katz and Lazarsfeld observed in summing up the findings of their classic study of the 1940 presidential election campaign:

> "The one source of influence that seemed to be far ahead of all others in determining the way people made up their minds was personal influence." Katz and Lazarsfeld, Personal Influence: The Part Played by People in the Flow of Mass Communications, 32 (1955).

The experience on the national level is mirrored in local elections. Professors Eldersveld and Dodge compared the respective weights of the written and spoken word in swaying voters and reported:

> "The Ann Arbor data showed the greater effectiveness of a personal interview over sending literature through the mails. . . . The Erie County study also demonstrated the potentiality of personal contact as a source of influence, particularly with regard to those persons who were generally untouched by the mass media." Eldersveld and Dodge, *Personal Contact or Mail Propaganda?; An Experiment in Voting Turnout and Attitude Change,* in Katz et al., eds., Public Opinion and Propaganda 532, 541 (1954).[3]

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[3] Further documentation of the importance of personal influence is provided in Berelson, Lazarsfeld, and McPhee, Voting, ix, 93-114, 115 (1954) ("the influences to which voters are most susceptible are opinions of trusted people expressed to one another"); Campbell, Gurin, and Miller, The Voter Decides, 199 (1954) ("Students of political behavior have long been aware of the vital role that interpersonal forces play in shaping an individual's political attitudes"); Wallace, First Tuesday: A Study of Rationality in Voting, 247 (1964) (confirming that attitude formation "takes place primarily through social *interaction* with people who are *significant* to the individual").

Professor V. O. Key of Harvard, in his highly regarded study of practical politics in the United States, also emphasizes the critical human element:

> "Given the bearing of the personal qualities of the candidate on electoral decision, the outcome of an election may be determined by the image of the candidate implanted in the minds of the voters." Key, Politics, Parties, and Pressure Groups 513-14 (4th ed. 1958).

Key maintains that even in an age of electronic communication, proper presentation of a candidate requires personal contact with the voters, and he emphasizes the added impact provided by a mass meeting:

> "The radio and TV are no substitute for the old-fashioned political rally where the candidate can be seen and heard. . . . The psychological evidence indicates that individuals in crowds are rendered suggestible. The applause picks up the doubters in the audience and carries them along." (*Id.* at 527.)

All this has direct relevance to the representation campaign. What the candidate and the precinct workers do in personifying their party in the civic election, the organizer and his assistants do, and more, for their union. Professors Karsh, Seidman, and Lilienthal comment:

> "The union, to workers in an isolated small town [we would add: to workers in any unorganized milieu], is an abstraction, of which the organizer is the only tangible embodiment. . . . Therefore his personality becomes important, for he sells himself along with, and perhaps as much as, his union; he must inspire confidence and be the kind of person the workers admire and like to be friendly with." Karsh, Seidman, and Lilienthal, *The Union Organizer and His Tactics: A Case Study*, in Barbash, ed., Unions and Union Leadership 83, 94-95 (1959). *See, also*, Ginzberg, The Labor Leader, 92, 98, 103-04 (1948); Perkel, *The Failure of Communication in an Organizing Campaign*, 80 Monthly Lab. Rev. 1200, 1201 (1957), *cf.* Barbash, *The Practice of Unionism*, 39 ff. (1956).

AFL-CIO field men agree wholeheartedly on the importance of personal contact. Many add that the force of personal contact may be intensified by the force of mass psychology. In the 1965 survey the Federation conducted referred to above, the AFL-CIO's twenty-one regional directors supplied such reasons as these:

> "Obviously nothing is as effective as the face-to-face opportunity to address the workers and present the union's program and issues, as well as to rebut the company's statements in its previous captive audience speech. Opportunity for questions and answers is a vital ingredient not present in letters or leaflets."
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> "What is spoken and how it is said can carry more weight than written statements."
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> "Union organizing is group action. When employers score with the whole group, union strength is effectively undermined, and individual contacts can rarely repair the damage."

Prior to the passage of the Act, the legal and practical problems posed for organizers in their effort to make contact with employees were of extraordinary dimensions. For as first recognized and stated by this Court in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921) and as restated in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), organization has an inherent appeal for working men and women:

> "Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary

and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."

Employers with an anti-union animus, and state and local officials sympathetic to them, have also recognized that the "necessities of the situation" fuel organizational drives and that the building of a successful union works a peaceful revolution which overturns the status quo and threatens their power and perquisites. Their reaction has been and continues to be wide-spread, active, and stubborn resistance to the right to organize. Aside from the use of threats and coercion, the most prevalent device used in these campaigns is to inhibit organized labor's access to employees in order to insulate them from the union movement's message. A variety of strategies have been employed in the attempt to thwart union communication. Prior restraints through licensing laws have been employed to seal off entire states from union organizers, *see, Hill* v. *Florida*, 325 U.S. 538 (1944), *Thomas* v. *Collins, supra*, 323 U.S. 516. The streets, parks, and meeting halls of large industrial cities have been closed to union solicitations and handbills, *see, Hague* v. *CIO*, 307 U.S. 496 (1939); *cf., Schneider* v. *State (Snyder* v. *Milwaukee)*, 308 U.S. 147, 155 (1939). Company towns have been declared off-limits to unions, *see, National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949). Door-to-door solicitation has been barred, *see, Staub* v. *Baxley*, 355 U.S. 313 (1958). Privately owned streets open to the public at large have been closed to those who wish to spread the union's views, *see, Marshall Field & Co.* 98 NLRB 88, *enforced as modified* 200 F.2d 375 (C.A. 7th Cir., 1953); *cf., Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968). Employees have been prevented from discussing unionism at the work site during their off-time, *see, Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945). And outside organizers who seek to spur organization have been refused access to the plant they seek to

organize, *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105.

The effects of these legal restrictions were, and continue to be, intensified by the practical problems of establishing personal contact with workers in modern America. Even when there are public walkways in front of a plant which are open to solicitation, this point of contact may not suffice because an ever higher percentage of employees drive to work and park within the plant, *see, Babcock & Wilcox, supra,* 351 U.S. at 106-107. And if contact cannot be made at the vicinity of the plant the problems become nearly insurmountable, for the sub-group sought to be reached, the workers of a particular plant, melds into the general population. As the Board has recognized (A. 19) their "names and addresses [are not] readily available from sources other than the employer."

In the AFL-CIO survey referred to above, the nineteen regional directors supplying data on this point estimated that the amount of time spent securing names and addresses ranged from a low of 15% to a high of 55-60%, with two directors simply stating that the effort "never stops" or is "constant." The consensus was that approximately 30% or more of the campaign had to be spent compiling names and addresses. Moreover, the average figure supplied by the directors for the "approximate percentage of names and addresses obtainable through the usual organizing methods" was between 50 and 55%. One regional director in the South, however, commented that it was "practically impossible to secure names and addresses because most workers are known by first names only or by a nickname, and addresses are unknown." Without such information, house to house solicitation is prohibitively expensive in terms of results per dollar and man-hour, since the union as opposed to religious, charitable, or political organizations is interested in reaching only the unorganized worker rather than the population at large. Indeed, even under the best of circumstances, as pro-

fessional fund raisers have discovered, while it is more satisfactory than no personal contact at all "most house-to-house canvassing is relatively sterile" when compared to solicitation in a group context, Seymore, Designs for Fund Raising, 76 (1966).

Finally it is unlikely that union meetings at a public or union hall will be adequate to establish contact with all the employees involved, especially those who have not had any prior contact with organized labor's message. Sebastian de Grazia, in his 20th Century Fund Study on work and leisure in this country, concluded that the average worker has only one hour of free time a day.[4] To expect the union meeting to win an appreciable number of the undecided away from recreational activity is literally to expect the impossible. And of course urban sprawl and congestion intensifies all of these problems.

2. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." Section 8(a)(1) implements this guarantee by interdicting interference, restraint or coercion of employees in the exercise of their Section 7 rights. And Section 9, which governs representation elections, empowers the Board to prescribe

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[4] de Grazia, Of Time, Work & Leisure, 96 (1962): "Work time, if we use the calculations made earlier, take up an average of ten hours and 40 minutes a day (job about 8 hours, journey to work 1½ hours, sphere of woman's work in housekeeping allocated for man, about 20 minutes, do-it-yourself work, about 40 minutes, moonlighting, 10 minutes), subsistence time takes up an average of 10½ hours (sleep 8½, dressing, eating, cooking and shopping nearly 2 hours) (Table 3). For all the rest, including prayers, getting the car fixed, going to barber, dentist, shoemaker or laundry—items which are usually overlooked—we can make a low guess of 20 minutes per day. . . . If, in order to give the worker the benefit of the week end, we calculate on the basis of a 5 day week, we shall have to say the job alone takes an average of nearly 9½ hours a day. On work days he would have not 2½ hours of time free but only about one hour."

rules that are consistent with "the whole philosophy of democratic institutions," *National Labor Relations Board v. A. J. Tower Co.*, 329 U.S. 324, 330 (1964).

In *Hague v. CIO, supra*, 307 U.S. at 512, Mr. Justice Roberts stated that "it is clear that the right peaceably to assemble and to discuss . . . the provisions of the National Labor Relations Act and of the opportunities and advantages offered by it . . . and to communicate respecting them whether orally or in writing is a privilege inherent in citizenship of the United States." And in *Thomas v. Collins, supra*, 323 U.S. at 533-534, this Court, while holding that Texas had unconstitutionally interfered with the right of Thomas, the president of the UAW-CIO, to make a public speech soliciting support for the Oil Workers International Union-CIO, set out the essential nature of the Section 7 right to discuss and receive information concerning unionization:

> "Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or nonresidents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice."

Given the nature of the "guarantees of national law" this Court has struck down a variety of state and local efforts to impede access by unions to employees on the streets and in the parks and other similar public places, *see*, cases cited on p. 19 *supra*. For this aspect of labor law has developed as an integral part of the law of the First Amendment which deals with "the public forum", *see* Kalven, *The Concept of the Public Forum: Cox* v *Louisiana*, 1965 Supreme Court Review 1. As Professor Kalven notes; *Id.*, at 12, the law in this area has been responsive to the argument "that in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum which the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." Surprisingly enough however in light of the fact that the main purpose of the Act was to free self-organization from employer restrictions, the law governing employer impediments to free access of organizers to employees developed under the Act has not kept pace with the First Amendment developments. Indeed prior to the *Excelsior* decision, which was rendered thirty years after the passage of the Act, the employer's power to thwart union access to employees during organizing campaigns remained unimpaired. For the employer's basic power in this regard rests in his control of the plant property and of the list of his employees' names and addresses. And neither of these citadels had been breached prior to *Excelsior* despite the fact that "apart from the suppressors of outright dishonesty, no regulatory principle has received wider application in the field of elections than the notion that each side should be given substantial access to the voters," since "the opportunity to reach *all* the [voters] is basic to a fair and informed election", Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor*

Relations Act, 78 Harv. L. Rev. 38, 92, 99-100 (1964) (emphasis added).

The forum to which unions have traditionally sought access, through the Act, is the plant, the natural and appropriate place for the exercise of the right of employees to "fully and freely . . . discuss and be informed" concerning unionization and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, since it is the focus of that portion of workers' lives which is most directly affected by the decision to organize, and since it is the site at which contact with all the employees may be made with a minimum of difficulty and expense. As Judge Clark of the Second Circuit has noted, *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2d Cir., 1963), *certiorari denied*, 376 U.S. 851:

> "The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work."
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> "It is inevitable that the thrust of an organizational drive would be blunted by rules which cut into a worker's use of his own time and made his association and

expression subject to management limitations. Clearly the existence of available alternatives would not mitigate this deleterious effect or insure the employee the organizational freedom which the Act seeks to give him."

To be sure, requiring the employer to open his plant to permit the exercise of these rights conflicts with his common law property rights just as the interdiction of the discriminatory discharge conflicts with the employer's common law employment rights, *cf., Jones & Laughlin, supra,* 301 U.S. at 45-46. But the Act was intended to change the common law balance and the Board and this Court quickly realized that since the plant "is the place uniquely appropriate and almost solely available" to employees for the exercise of their full freedom of association, "inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining". *Republic Aviation Corp. supra,* 324 U.S. at 802, ns. 6 & 8. Thus in *Republic Aviation* this Court approved Board rulings that an employer could not, consistent with the Act, prevent employees from soliciting for the union or distributing union handbills during non-working time and in non-working areas of the plant. Further, in *Stowe Spinning Co., supra,* 336 U.S. 226, the Court approved a Board ruling that an employer violated the Act when he discriminatorily closed the only meeting hall in a company town to a union meeting. However, in *Babcock & Wilcox, supra,* where the Board had ruled that non-employee organizers, as well as employees, could distribute union literature during non-working time in non-working areas of the plant, this Court held, 351 U.S. at 112-113:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not

discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit."

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"No restriction may be placed on the employee's right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *NLRB*. 324 U.S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records."

And in *United Steelworkers (Nu-Tone Inc.), supra*, 357 U.S. 357, 363-364, where the question of what constitutes discriminatory enforcement of non-solicitation rules was at issue, the Court followed the approach of *Babcock & Wilcox*.

Thus the applicable law, where the non-working areas of a plant are sought as a forum, is that employee solicitors and handbillers are protected by the Act unless there are special circumstances which require restrictions in order to maintain production or discipline, but that non-employee organizers are barred unless they can show that alternative channels of communication are closed. It is our view that the portion of the law addressed to employee activity, while not as broad as it should be, *see, Stoddard-Quirk Mfg. Co.*, 138 NLRB 605 (1962), is basically sound. For it proceeds from the premise that the common law of property is not the key, *see*, p. 25, *supra; cf., Marsh* v. *Ala-*

bama, 326 U.S. 501, 506 (1946), and that the solution to the problem posed is to be found by balancing the substantial interests involved—the statutory right of employees to "fully and freely . . . discuss and be informed concerning" unionization, and the employer's interest in efficient production and discipline. It is also our view that the portion of the law addressed to non-employee organizer activity is unsound.

First, the *Babcock & Wilcox* rule acknowledging the value of contacts between employees and professional organizers, promises a measure of flexibility in the regulation of access to the plant: "This is not a problem of always open or always closed doors for organization on company property" 351 U.S. at 112. In *Babcock & Wilcox*, however, it was found to be practically and practicably impossible to distribute handbills to the majority of employees entering the plant, since they drove to work. Nor had other methods of contact proved fruitful. The union succeeded in contacting only 20% of the company employees away from the plant, and to achieve this measure of communication it was forced to rely on chance contacts in the business district, telephone or mail contacts (only 60% had telephones), or trips to the employees' houses which were scattered over a radius of 30 miles, 109 NLRB at 492-493, 351 U.S. at 106-107. Taking this background as their cue on the quantum of proof necessary to open the plant gates, the lower courts have concluded that a showing of greater expense or formidable practical difficulty is insufficient and that only impossibility will suffice. Thus in the normal organizing campaign *Babcock & Wilcox* has resulted in total subordination of the right of employees to be fully and freely informed concerning unionization at the plant and the "correlative . . . right . . . of union[s] . . . to inform employee[s] . . ." about this subject to the employer's interests. Entry is allowed only where the employees live on the employer's property or where the employer enforces an unlawfully broad nonsolicitation rule, *compare*, *May Co.*, 136 NLRB 797, *en-*

forcement denied 316 F.2d 797 (C.A. 6th Cir., 1963), *with, Montgomery Ward & Co.* 145 NLRB 864, *enforced* 339 F. 2d 889 (C.A. 6th Cir., 1965), and, *S. & H. Grossingers Inc.*, 156 NLRB 233, *enforced as modified* 372 F.2d 26 (C.A. 2nd Cir., 1967).

Second, this result was not arrived at through an inquiry into the balance to be struck between the substantial employer and employee interests at stake. Indeed, it could not have been arrived at in this manner without reconsidering the rationale of *Republic Aviation*, a step which *Babcock & Wilcox* did not purport to take. For *Republic Aviation* recognizes that, absent special circumstances, union activity in non-working areas of the plant is compatible with the employer's interest in efficient production and discipline. Thus the employer interest protected by *Babcock & Wilcox* is his bare claim to an absolute right to dominion over his property, a right claimed simply to prevent his employees from hearing and heeding a union message and possibly organizing to his detriment, *cf., Logan Valley Plaza, supra,* 391 U.S. at 324-325. And it is precisely because the *Babcock & Wilcox* rule is not grounded in an inquiry into the substantial interests involved, nor rooted in the law which had preceded it, that it has resulted in the resurrection of a rule which had plagued the development of labor law prior to the passage of the Act and which this Court had squarely repudiated when called upon to face it directly in *AFL* v. *Swing*, 312 U.S. 321 (1941)—that organizing activity otherwise proper becomes improper if undertaken by those who are not employees of the particular employer involved. In *Swing* (*Id.* at 323) this Court answered affirmatively the question, "[Is] the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is not immediate employer-employee dispute":

"A state cannot exclude workingmen from peacefully

> exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case." (*Id.* at 326.)[5]

Third, quite apart from its substantive nature and effect, the *Babcock & Wilcox* rule is unsound because it has proved impossible to administer in a rational manner. As Dean Bok of the Harvard Law School has stated, Bok, *supra.*, 78 Harv. L. Rev. at 95-96:

> "Once one moves beyond the clear case, it becomes extremely difficult to determine whether satisfactory alternatives actually exist for [unions to reach] the employees. What if only half of the employees cross the adjacent sidewalk? The remaining workers must presumably be reached by other means such as house calls and home mailings. But what if the union lacks a comprehensive mailing list, as is often the case? And how many visits can one expect the union to make if there are x number of employees living within a radius of y miles? Radio and newspaper appeals provide fur-

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[5] Section 8(b)(4) of the Act must, of course, be taken into account in evaluating the present standing of *Swing* in relation to activity deemed to have a coercive aspect, *see, National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). But Section 8(b)(4) does not bolster *Babcock & Wilcox* for that section focuses activity at the plant; it does not seek to direct it elsewhere, *see, United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)* 376 U.S. 492 (1964).

ther possibilities to be taken into account. But how satisfactory are they? And should small unions be held to more costly alternatives of this kind? These questions will require time and money to investigate—much more time and money, one suspects, than a [illegible] cost which employers will have to incur if they must allow the employees to distribute on their parking lots. Moreover, any attempt to weigh dissimilar methods of communication is bound to produce inconclusive and subjective decision in an area where clear rules are particularly important. Without such rules, management may be unable to judge whether satisfactory alternatives will be found to exist, particularly since the employer may lack complete information regarding the union's capability to reach the employees. Under these circumstances, some employers will allow distribution in doubtful cases to avoid any risk of legal proceedings. Others will be tempted to prohibit distribution if any case can be made for doing so, for in this way they can force the union either to suffer the consequences in the election or to contest the issue during many months of litigation. As a practical matter, therefore, one may doubt whether just results will in fact be achieved."

"In view of all these problems, there is much to be said for avoiding consideration of alternative channels of communication in these cases. . . . . Thus the Board would do well to follow the lead of the Second Circuit by pointing out explicitly that "in addition to being an appreciable increase in the Board's already unwieldy work load, [the consideration of alternative means of communication] . . . would simply be an incitement to litigation and casuistry."

Dean Bok's critique is two-pronged. Assuming that the Board had world enough and time it is most unlikely that it could apply the *Babcock & Wilcox* rule to particular cases in a satisfactory and predictable manner. For a serious effort to grapple with the task set out in *Babcock & Wilcox* requires the Board to balance a "complex of variables" which include a host of unruly "incommensurable quantities," *Case Note: Excelsior Underwear*

Inc., 80 Harv. L. Rev. 459, 462 (1966). And as this Court has recognized, in the related area of Board regulation of economic weapons, it is inconsistent with the Act, to allow, or we would add to require, the Board to decide that a particular form of action is improper on the subjective ground that it gives employers or unions "too much power." *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 317 (1965). Yet in the last analysis, because of the incommensurable nature of the variables to be weighed, decision-making based on that subjective standard is precisely what *Babcock & Wilcox* requires. Moreover the Board does not have an infinite amount of time to engage in an abstract logical exercise. Its function is to develop and apply manageable rules to govern the fast moving events of an election campaign. Thus even if one had confidence in the proposition that *Babcock & Wilcox* sets out a standard which could be applied rationally in the long run, it would still be open to criticism on practical grounds since the regulatory context calls for clear rules rather than imprecise standards which are "an invitation to litigation and casuistry," *United Aircraft, supra*, 324 F.2d at 130.

3. In light of the above it is plain that there is no merit in the proposition, advanced by Respondent, that the scope of the *Babcock & Wilcox* rule should be enlarged and that it should become a rule of general application. Nor, we submit, is it desirable to do no more than limit *Babcock & Wilcox* to property cases involving non-employee organizers. To do so would require the Board either to continue to weigh "practically incommensurable quantities" in order to "determine whether existing means of access, including the availability of names and addresses, are sufficient to achieve free" access when unions seek the plant as a forum, *Case Note, supra.*, 80 Harv. L. Rev. at 462-463, or to escape this intractable problem by holding that *Excelsior* "[raises] a presumption of adequate union access," *Ibid, see, General Electric Co.*, 156 NLRB 1247

(1966). While such a presumption would not be soundly grounded in practical realities, *see* pp. 20-21, *supra*, it would, if past experience is a guide, be "virtually impossible" to overturn, *Case Note*, *supra*, 80 Harv. L. Rev. at 463. And the implementation of such a presumption would entail special rules for employees on the plant, for non-employee organizers on the plant, for non-employee organizers off the plant, for employers on or away from the plant, etc., each developing separately and inconsistently without reason as a guide. What is necessary instead is a return to the approach foreshadowed by *Thomas* v. *Collins*, an approach which builds upon the recognition that the Act was intended to put an end to unjustified impediments to free access by organizers to employees erected by employers, or by state or local governments. For only such an approach provides the principled basis for the development of the law in this area required for rational administration of the Act.

In *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1948), this Court stated that the "liberty of circulating is as essential to freedom [of speech] as liberty of publishing, indeed, without the circulation the publishing would be of little value, *Ex Parte Jackson* 96 U.S. 727, 733." Thus methods of communication as well as the content of such communication are entitled to the protections of the First Amendment. The prophet is not condemned to the wilderness, for the Constitution, which recognizes that the entire society suffers when the opportunities of potential publishers and their auditors are interfered with, insures that a speaker is to have effective access to the audience he seeks to reach, *cf.*, *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Talley* v. *California*, 362 U.S. 60 (1960). To be sure, the circulation of views involves conduct which may impinge on other values and interests and may on that account be subject to some regulations relating to time, place, manner, and circumstances, *see*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); but as Professor Kalven has

noted, the balance which the Court has struck is one which recognizes that there is a "weight of enthusiasm for the personal right involved." Kalven, *supra*, 1965 Supreme Court Review at 16. The governing standard is that enunciated in *Schneider* v. *State*, *supra*, 308 U.S. at 161):

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." (Footnote omitted.)

Broad freedom to circulate is the norm and abridgments are to be tolerated only when they protect the most compelling countervailing interests and are stated in the narrowest terms. Since the freedom to circulate views enjoys the same high place in the gamut of values established by the Act that it does in the Constitutional scheme, *see*, *Thomas* v. *Collins*, *supra*, 323 U.S. at 533-534, it is natural and appropriate for the Board in assessing employer impediments to the enjoyment of the "full freedom to discuss and be informed concerning" unionization and to the "correlative . . . right . . . of union[s] . . . to inform employee[s]"

about this subject to be guided by the balance struck in *Schneider*. For there is no possible policy consideration which justifies according a higher value to employer interests in conflict with free and untrammeled access to employees than is accorded to the conflicting interests of state governments. The common object of both the Constitution and the Act is to maximize the opportunities for free access in order to "insure the opportunity of all employees to be reached by all parties" (A.24).

Schneider and the cases following it do not simply set out the governing standard; they also set the weight to be accorded the competing interests which must be considered in determining whether unions are to have access to the plant and access to a list of the employees' names and addresses. First, the rationale of the First Amendment cases demonstrates the soundness of the position, approved in *Republic Aviation Corp., supra.*, 323 U.S. at 802, n. 6., that in light of the Act's special solicitude for the circulation of views concerning organization among employees, the plant is an appropriate forum for the dissemination of such information. It is, of course, true that in the First Amendment area this Court has dealt primarily with the right to circulate views on the streets and in the parks. These facilities are clearly appropriate for communication, since they have "immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions," *Hague* v. *CIO, supra,* 307 U.S. at 515. Thus there has been little occasion for the Court to refine the considerations that make a particular place an appropriate situs for discussion and communication. But as Judge Kaufmann of the Second Circuit has stated, *Wolin* v. *Port of New York Authority,* 392 F.2d 83, 89 (C.A. 2nd Cir., 1968), *certiorari denied* 393 U.S. ....., 37 Law Week 3177, drawing upon the essence of this Court's views, the "character of the place, the pattern of usual activity, the nature of its essential purpose and the popula-

tion who take advantage of the general invitation extended" are the relevant criteria in determining whether a particular site is "an appropriate place for communication of views on issues of political and social significance." Thus:

> "The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that courthouse passages be kept free of demonstration. But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests. . . . However, [a particular area is an appropriate place] for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. . . . The congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum" (*Id* at 90).

These considerations make it manifest, as the Board has always recognized, that for the purposes of organizing campaigns covered by the Act, the plant is an appropriate forum. And once appropriateness is established there can be no doubt that the right to circulate views can not be barred by an appeal to the argument that the owner, whether public or private, has the unfettered property right to exclude any one he wishes. Where the right to circulate views is at stake, common law property rights, based on the concept of absolute dominion over areas open to the audience the speaker wishes to reach, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized American society," *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 631-632 (1958). Thus, like the common law of libel, property concepts must, in appropriate instances, give way to our "profound national commit-

ment to the principle that debate on public issues should be uninhibited, robust and wide open,'' *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964):

> ''The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of [a walkway in a shopping center] by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here.''
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> • • •
>
> ''Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh* v. *Alabama*, 326 U.S., at 506, ''Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.'' *Amalgamated Food Employees* v. *Logan Valley Plaza*, *supra*, 391 U.S. at 324-325.

Second, the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that other places remain open for their expression. The fact that the State has afforded an opportunity for discussion elsewhere is not sufficient to sustain State action which works a substantial interference with communication. Since the thrust of the First Amendment is to maximize communication, the law simply distinguishes between appropriate and inappropriate locations for public speech; it does not seek to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra,* 308 U.S. at 163.

Thus *Schneider, Logan Valley Plaza,* and *Wolin* highlight the basic defect in the *Babcock & Wilcox* rule. Where interference with the right to circulate views is shown it is for the State, or the employer, to justify the abridgment, not for the speaker to justify his right to inform, for the principles underlying the First Amendment, and the Act, are his justification. For this reason, so far as we are aware, there has never been a First Amendment case in this Court in which a speaker seeking the right to use a particular appropriate forum has been required, as a precondition to the exercise of this basic right, to establish that alternative channels of communication are closed to him. *Babcock & Wilcox* diverges from the main stream of the entire body of relevant law in this area since, without supplying a reasoned basis for doing so, it rejects the balance of interests worked out in *Schneider,* and does so in a manner which stands the First Amendment on its head. The burden of proof is taken from the shoulders of those who would curtail communication and placed on those who wish to communicate, and as we have noted, p. 27 *supra,* that burden is a heavy one.

Third, the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that group, rather than individual, notions of the right to privacy, control, and that it is for the State, rather than the individual, to decide whether he shall be free to hear what he wishes to hear. As this Court stated in *Martin* v. *Struthers,* 319 U.S. 141, 143-144, 145-147 (1943):

"We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims [door to door religious solicitations], as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

• • •

"While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance."

• • •

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *See also* *Lamont* v. *Postmaster General, supra.*, 381 U.S. 301.

Thus, *Martin* v. *Struthers* demonstrates that free access can not be stifled by group decision, even when the individuals to be approached are voting members of the group. It is *a fortiori*, then, that the employer, who has his own interests to consider, interests which are often separate

from and to a marked degree antagonistic to those of his employees, can not speak for them.

In sum, we suggest that in weighing competing interests when dealing with employer impediments to the right of employees "fully and freely to discuss and be informed concerning" unionization, and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, the Board should be guided by the *Schneider* standard and by the concrete applications of that standard in *Schneider* itself, in *Logan Valley Plaza*, and in *Martin* v. *Struthers*. In making this suggestion we do not mean to imply that employer impediments and state impediments to free access are completely fungible; rather it is our position that the two are so analagous that the weight to be given such competing claims as property rights, the right of privacy, etc. is basically the same, *see Thomas* v. *Collins; cf., Linn* v. *Plant Guards*, 383 U.S. 53 (1966). In each situation it must be remembered that the right to circulate views is a "fundamental right" and that the opportunity to reach all voters is "basic to a fair and informed election." Bok, *supra*, 78 Harv. L. Rev. at 99-100.

4. The metaphysical dispute between the common lawyers and the civil lawyers is an ancient one, and as is so often true of arguments from idealized abstractions, it is inherently incapable of resolution. For the substance of the matter is that each of these systems has within it the potential for the making of good law when administered by able men, and neither is a foolproof method for avoiding bad law. Nevertheless, as the instant case demonstrates, this scholarly debate has not been confined to the realm of the legal philosophers, for it has entered the domain of administrative law by the insistence upon legal rules that would dictate to administrative agencies as to their choice between adjudication and formal rulemaking. We submit that in this area the better part of wisdom is a healthy skepticism toward those who claim that there are rules enforceable by the courts which demarcate the proper sphere for formal

rulemaking and for adjudication.[6] As this Court has consistently recognized, "Any requirement . . . [of] quasi-legislative promulgation of rules to be applied in the future . . . would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise," *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). Thus "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency," *Id.* at 203, *see also*, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371 (1965).

The course marked in *Chenery* is parallel to the one taken by Congress in adopting the Administrative Procedure Act (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*). The APA recognizes that administrative agencies may act by adjudication, or by formal rulemaking, and it prescribes the procedures to be followed in each case. It does not undertake to dictate when one mode of procedure or the other is to be utilized, for the definitions of rulemaking and adjudication are general and neither is a watertight compartment, *compare* 5 U.S.C. 551(4) & (5) *with* 5 U.S.C. 551(7). As the Second Circuit stated, *National Labor Relations Board* v. *Beech-Nut Life Savers Inc.*, ... F.2d ....., 69 LRRM 2846, 2848-2849 (C.A. 2nd Cir., 1968):

> "Congress, in giving the National Labor Relations Board quasi-judicial powers, 'cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. . . .' *NLRB* v. *A. P. W. Products Co.*

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[6] To some extent the drive for these legal rules stems from an impatience with agencies such as the Board which have not utilized the formal rulemaking mechanism. We submit that this impatience is not a proper ground for legal decision. In any event, it is our view, based on thirty years of practical experience, that in light of the nature of the Act, the Board has been wise to follow the course it has chosen.

> [316 F.2d] at 905. Therefore, we hold that either of the congressionally authorized proceedings can be a proper source of Board rules having general applicability and future effect."

As Judge Friendly has pointed out, "where the [statutory] standard is . . . general, it is imperative that steps be taken over the years to define and clarify it—to canalize the broad stream into a number of narrower ones." Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 874 (1961). Thus, one of the central administrative tasks, and the task that the Board performed here, is to develop relatively particularized standards. The question is whether that effort is to be by formal rulemaking or by adjudication. As we noted at the outset, history and logic suggest that a preoccupation with form in this area is unsound. Thus, despite the fact that Judge Friendly is a proponent of formal rulemaking, a reading of his extensive study of what the administrative agencies have been doing in fact does not point toward the conclusion that success has depended on the choice between adjudication or formal rulemaking, *see*, Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926 (1965). Nor does a reading of the Federal Register leave one with the feeling that rulemaking is the sole avenue to legal excellence. Indeed, focusing on the instant case, we find it extremely difficult to see how the *Excelsior* requirement would have been improved by promulgating it as a formal rule. For the impact of the decision is clear, the reasons for it are fully yet concisely stated, the arguments against it are fully met, the result reached combines a measure of accommodation to a demonstrated need for change with, to say the least, a fair regard for the equitable interests affected by legal change, the proceeding was based on full notice that was designed to reach any interested party, and the substance of the requirement is open to full judicial review. In sum, the result is sound, there is every

indication that it was reached after full deliberation, and the means used were fully consistent with due process and with the demands imposed on the Board as an agency subject to court review. *Excelsior* illustrates the "flexibility of the adjudicative process" which has caused the more thoughtful of the proponents of formal rulemaking to note that "there are some indications of a tendency . . . to overstate the disparity between the modes of proceeding" Shapiro, *supra*, 78 Harv. L. Rev. at 929-930. For the choice is not simply between formal rulemaking and retrospective *ad hoc* litigation, it also includes the setting of rather precise prospective standards at the instance of litigants and against the background of concrete situations.[1]

At an earlier point in our argument, p. 31 *supra*, we noted that the *Babcock & Wilcox* rule has been criticized as an "invitation to litigation and casuistry" because it entails a consideration of complex and incommensurable factors under an imprecise standard. The *Chenery* rule is sound precisely because it is immune to this criticism. The factors that must be considered in determining the method of administrative procedure to employ are certainly as complex as any in the law; and insofar as we are aware, a precise standard to harmonize them has yet to be developed. Thus their consideration is best left to the respective agency's "informed discretion" rather than to rules of law. For there are times when the demands of policy inherent in a situation or a statutory directive, require the drawing of lines more nice than obvious. But there is no reason for drawing such lines when doing so serves no substantive interest. And as we have just attempted to indicate, the gloss the court below sought to place on *Chenery* serves no substantive interest other than the interest of disappointed

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[1] Courts set precise standards that affect others beside the immediate parties as a matter of routine. Indeed that is precisely what the court below did in the instant case.

suitors in maximizing their opportunities for a successful appeal.

The court below took the position that the concept of adjudication cannot comprehend a decision setting new legal standards which are to be applied entirely in the future (A.111-112). This position is tied too strictly to the limitations placed on the federal courts by the Constitution which restricts them to the consideration of "cases and controversies," for the "case and controversy" requirement does not apply to the administrative agencies, *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929). Moreover, the Constitution's requirements are not as strict as the court below evidently supposed, *see, England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). The result of this definition of adjudication is that an agency cannot, in an adjudicative proceeding, combine responsiveness to the need for change with consideration for the equitable interests engendered by change in legal doctrine. Moreover, this definition cannot be used as a source of guidance by an agency going about its business in a normal manner. When such an agency takes up a request for a change in doctrine proposed by a litigant, it does not known whether it will accept the proposal or not. Whether there will be new law is the question under consideration. Yet the rationale of the court below means that a decision against change is adjudication but that a decision for prospective change is not.

This anomaly is certain to have a deleterious effect on the administration of the Act, for it governs an area in which the parties are well organized and have demonstrated the desire to press for change. The question of whether employers should be required to furnish lists of their employees' names and addresses was raised by union litigants; it did not emerge full-blown from the Board's brow. Thus, to engage in formal rulemaking the Board would have had to sidetrack litigation already begun. And the inflexibility which would be entailed in dovetailing adjudication and

rulemaking is not a product of the peculiarities of this case. It is a recurring problem whenever an agency has a continuing stream of litigation coming before it. The result will be to shift initiative from the parties, who know their needs best, to the regulatory agency, which may be reluctant to assume the responsibility for initiating change as opposed to approving it. By thus discouraging change, the definition of adjudication proposed by the court below cuts against the basic insight as to the essence of the administrative process enunciated in *American Trucking Association* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967):

> "The Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."
>
> "In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

To pay this price for no discernible return in order to serve an abstraction is unwarranted. In sum, as the Ninth Circuit recently stated the matter, *British Auto Parts* v. *National Labor Relations Board*, ... F.2d ....., (C.A. 9th Cir., No. 21, 883, Dec. 17, 1968) (sl. op. 3):

> "[T]he question whether an employer could at all or should be required to provide the addresses of his employees for purposes of a representation election was a salient issue in the *Excelsior* controversy. Thus

it manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve in the *Excelsior* proceeding. To us it seems clear that [the Board's holding] constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result.

"While the Board engaged in spelling out the nature and significance of its holding and the details of the practical operation thereof, such facilitating implementation would not in our opinion nullify the decisional or adjudicative character and basis of what it had done. It would be only natural that, with its heavy burden of work, the Board would seek to leave no possibility for claims of confusion and misunderstanding . . .

"Further, we are not able to see how the fact that the Board chose not to make the decisional rule which it laid down controlling of its relief in the particular situation could alter the legal aspect or significance of its general adjudicative holding. We are not aware of any authority, other than the devisive holding in *Wyman-Gordon*, that a rule which has been laid down by an administrative tribunal on adjudicative element and process in a controversy before it is without force or effect as a decisional rule unless it is made to have application to the parties and to the relief of the immediate proceeding."

CONCLUSION

For the foregoing reasons, as well as those stated by the Board, the decision of the court below should be reversed, and the case should be remanded to the court of appeals with directions either to affirm the judgment of the district court enforcing the subpoena or to remand the case to the district court for the entry of an injunction in accordance with count II of the complaint. In doing so this Court should make it clear that the *Excelsior* rule is a proper method for implementing the right of employees "fully and freely to discuss and be informed concerning"

unionization and the "corrective . . . right . . . of union[s] . . . to inform employee[s]" about this subject, *Thomas* v. *Collins*, 323 U.S. 516, 533-534 (1945) since it comports with the standards enunciated in *Schneider* v. *State*, 308 U.S. 147, 161 (1939).

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QUESTIONS	REGIONS: Boston	New York	Philadelphia	Baltimore	Atlanta	New Orleans	Knoxville	Cleveland	Indianapolis	Detroit	Milwaukee	St. Paul	Chicago	St. Louis	Tulsa	Fort Worth	Denver	Portland	San Francisco	Puerto Rico	Los Angeles Comm.	Totals Approximate Averages, and "Consensus"
Total elections surveyed	7	54	20	66	34	3	52	50	27	15	35	14	48	39	51	14	5	8	11	16	211	780
Elections with captive audience speeches	7	49	7	47	25	3	48	20	19	14	18	13	21	36	39	14	3	1	7	8	170	570 (73%)
Smallest unit where captive audience speech is likely to be held	10	65–70	10–20	20	(1)	(1)	(1)	20	15–20	10	15–20	6	15	3	30	(1)	(1)	5	2–20	25	10	10–20
Period prior to election when most captive audience speeches occur	2 da.	1 wk.	1 wk.	2 da.	2 da.	(2)	2 da.	—	10 da.	1 wk.	2da. 1wk.	25 hr.	3 da.	2 da.	2 da.	2 da.	1 wk.	2 da.	2da. 1wk.	2 da.	2 da.	2 days–1 wk.
Time for reasonably adequate reply by ordinary methods of communication	2 wk.	2 wk.	1 wk.	1 wk.	1 wk.	1–2 wk.	1–2 wk.	2 wk.	2 wk.	2 wk.	2 wk.	1 mo.	2 wk.	1 wk.	2 wk.	1 wk.	1–2 wk.	1–2 –4 wk.	1–2 wk.	—	2 wk.	1 week–2 wk.
Largest unit for reasonably adequate reply by ordinary methods	25	25–50	100	25	100	50–75	50	50	15–20	25	50 100	225	50	25	25	100	25	10–25–50 100	50–100	—	25	25–50
Elections with company mailings	6	48	9	41	25	3	52	20	18	15	29	11	31	39	47	14	2	1	7	9	165	592 (76%)
Elections with union mailings	7	40	13	17	20	1	25	30	13	5	30	10	40	27	43	12	5	2	9	6	150	505 (65%)
Largest unit for obtaining names by traditional methods	15–20	65–70	200	50	100	(3)	50–250	30	45	20	75–100	50	100	50	75	50	25–50	40 50	100	50–75	30	50–75
Percentage of time spent in campaign obtaining names and addresses	50	40–45	25	25	30	(4)	30	—	55–60	(4)	30	35	25	20	30	25	50	30	20–25	25–35	15	30+%
Percentage of names and addresses obtained by traditional methods	10–30	45–50	80	60	65	30–50	50	50–60	65	30–40	50	30	40–55	35–65	60	50–60	40–60	60–80	40–60	25	50	50–55%
Elections with union house calls	7	28	14	53	34	3	47	50	25	7	35	14	43	39	36	14	5	8	11	11	190	675 (86%)
Percentage of employees contacted by house calls in average campaign	15–30	30–35	70	60	40–50	10–50	35–45	20–40	25	20	35–50	30	50	35–50	20	50–60	25	30–80	18–40	35	25	35–40%

NOTES

(1) "All units"—"regardless of size"
(2) "First meeting, when campaign begins"
(3) "Practically impossible—workers are known by first names only"
(4) "Effort never stops"—"constant"

EXPLANATION

This chart tabulates data on the use of captive audience speeches and address lists in representation election campaigns during calendar year 1964. Questionnaires were sent to the twenty regional directors of the AFL-CIO and the head of the Los Angeles Organising Committee. The complete questionnaires, containing both statistical data and extensive comment (from which were drawn the quotations in the brief), are available for inspection at AFL-CIO Headquarters.